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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re:

SPOT HOLDINGS, INC., fdba SPOT
DEVICES, INC.

Debtor.

Case No. BK-13-51731-BTB

(Chapter 7)

**OPPOSITION TO MOTION TO
APPROVE COMPROMISE AND
SETTLEMENT OF ESTATE CLAIMS
(HAWS CORPORATION, INC.)**

Hearing Date: December 13, 2015

Hearing Time: 2:00 p.m.

OPPOSITION OF MOTION TO APPROVE COMPROMISE

Attorney Adam McMillen of Watson Rounds, on behalf of Timm Peddie, Creditor
herein, hereby opposes the Motion to Approve Compromise for Haws Corporation concerning
Timm Peddie's claims in the Second Judicial District Court of the State of Nevada.

In light of Judge Hardy's August 2014 order addressing motions to dismiss, it is not
certain what claims the debtor owns. If the debtor does not own Mr. Peddie's, then Trustee
cannot settle those claims on behalf of the estate. Unless and until this issue is resolved, the
motion should be denied.

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ARGUMENT

I. Trustee Has Burden Of Persuasion

The burden of persuading the court that the compromise should be approved is on the parties proposing the compromise. *In re Trism, Inc.*, 286 B.R. 744, 752 (Bankr. W.D. Mo. 2002). As a proponent of the proposed compromise, the trustee has the burden of persuading the court that the settlement is in the best interests of the estate and should be approved. *In re Tennol Energy Co.*, 127 B.R. 820.827-28 (Bankr. E.D. Tenn. 1991) *quoting In re Lawrence & Erausquin, Inc.*, 124 B.R. 37, 38 (Bankr. N.D. Ohio 1990). The court should review the issues and determine whether the settlement falls below the lowest point in the range of reasonableness. *Id.*, *quoting In re Teltronics Services, Inc.*, 762 F.2d 185, 189 (2d Cir. 1985). It is essential that every important determination in these proceedings receive the “informed, independent judgment” of the bankruptcy court. *National Surety Co. v. Coriell*, 289 U.S. 426, 436 (1933). The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise is fair and equitable. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claims be litigated. *Id.* Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. *Id.* Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. *Id.* at 424-25.

Trustee cannot demonstrate that the Haws compromise is fair and equitable, therefore, his motion to approve compromise must be denied.

II. Trustee's Motion To Approve Compromise Is Based Upon A False Premise

The entire basis for Trustee's motion is that Judge Hardy issued an order in 2013 wherein he made findings that certain claims in the state court action were derivative in nature and belonged to the estate. Trustee inappropriately argues "[t]hat order was final and has not been appealed" and that "[t]he settlement described herein is designed to settle all claims of a derivative nature. This settlement is intended to be interpreted as broadly as legally possible to extinguish any claim Mr. Peddie could bring that has any derivative characteristics." See Motion at 2:19-24 (emphasis added). Trustee's analysis leaves out important facts and therefore misrepresents the character of Mr. Peddie's claims and the finality of Judge Hardy's orders.

First, with regards to Mr. Peddie's alter ego claims, Judge Hardy recently stated "Mr. Peddie's factual allegations show influence, unity of interest and ownership, and that fraud could result if the corporate fiction is upheld." See **Exhibit 1**, 2014-0804 Order Addressing Motions to Dismiss ("August 2014 order") at 8:6-7. In granting leave to amend the complaint, Judge Hardy stated it is not certain Mr. Peddie cannot plead additional facts to state individual claims based on breach of fiduciary duty. *Id.* at 8:8-11:16. In so doing, Judge Hardy concluded:

Mr. Peddie may individually bring claims for breach of fiduciary duty, constructive fraud, and aiding and abetting breach of fiduciary duty to seek relief for the wrongful dilution of his ownership interest in Spot. However, the interference with prospective economic advantage and unjust enrichment claims do not appear to be based on equity dilution and seek to remedy harms incurred by Spot. Accordingly, these claims are dismissed as derivative claims.

...

Mr. Peddie may amend his first amended complaint to address a possible de facto merger. He may also allege additional facts regarding the existence of controlling shareholders in order to state individual breach of fiduciary duty and fraud claims. If Spot Investments owed fiduciary duties to Mr. Peddie,

1 Mr. Peddie must identify a legitimate legal basis and clearly allege facts that
2 establish this.

3 *Id.* at 12:6-20 (emphasis added). Therefore, Trustee's arguments related to the ownership of
4 the claims at issue are based upon a false premise.

5 With regards to the specific claims for breach of fiduciary duty, constructive fraud
6 and aiding and abetting the breach of fiduciary duty, Judge Hardy's August 2014 order was
7 unambiguous. The August 2014 order specifically addressed Trustee's argument regarding
8 the claims being derivative, which they are not: "Spot and Spot Investments argue these
9 claims should now be dismissed as **derivative claims** that cannot be brought by Mr. Peddie
10 individually." *See Exhibit 1* at 8:8-27 (emphasis added). As indicated, Judge Hardy found
11 that Mr. Peddie may bring these claims individually as direct claims. *Id.* at 12:6-8.

12 Trustee also erroneously argues Mr. Peddie's state court action is a "derivative
13 action" where "all claims in Mr. Peddie's Complaint (with the exception of the NRS 92A
14 relief) are property of the Debtor's estate." *See Motion* at 4:15-24. Trustee goes even further
15 and summarily concludes that "[t]his is confirmed by Judge Hardy's November 25, 2013
16 Order" and then asserts that Judge Hardy "specifically found that an action for breach of
17 fiduciary duty or aiding and abetting a breach of fiduciary duty belongs to the corporation,
18 that being Spot." *See Motion* at 4:24-28. As shown above, Judge Hardy found otherwise.
19 *See above and Exhibit 1.*

20 Also, *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006) teaches that certain corporate
21 transactions can give rise to direct, as well as derivative, claims for breach of fiduciary duty
22 against a controlling shareholder. Specifically, *Gentile*-type direct claims arise when:

23 a stockholder having majority or effective control causes the corporation to
24 issue "excessive" shares of its stock in exchange for assets of the controlling
25 stockholder that have a lesser value; and ... the exchange causes an increase in
26 the percentage of the outstanding shares owned by the controlling stockholder,
27 and a corresponding decrease in the share percentage owned by the public
28 (minority) shareholders.

1 *Gentile*, 906 A.2d at 100. In other words, a derivative claim can also be a direct claim when a
2 controlling shareholder “extract[s]” or “expropriat[es]” a minority shareholder’s economic
3 value and voting power. *Gentile*, 906 A.2d at 102.

4 The central question in *Gentile* was whether the minority shareholders could bring
5 fiduciary duty claims directly. *Id.* at 96. *Gentile* held plaintiffs could bring direct claims
6 because the transaction at issue had expropriated both economic value and voting power
7 directly from the minority shareholders to the controlling shareholder. This exception to the
8 rule against direct claims came as “the harm resulting from the overpayment [was] not
9 confined to an equal dilution of the economic value and voting power of each of the
10 corporation’s outstanding shares,” but that such harm also was, at least in part, individual in
11 nature. *Id.* at 100.

13 The essential teaching of *Gentile* is that in situations where a corporation issues
14 excessive shares to a controlling shareholder in exchange for an asset of lesser value, minority
15 shareholders can bring both direct and derivative claims. *See also Cohen v. Mirage Resorts,*
16 *Inc.*, 119 Nev. 1, 62 P.3d 720 (2003).

18 Also, Judge Hardy’s August 2014 order is in stark contrast to his previous order where
19 he stated as follows:

20 All causes of action, with the exception of claims based on Mr. Peddie's right to
21 payment for his shares as a dissenting owner, belong to Spot and therefore the
22 bankruptcy trustee. Accordingly, the first cause of action for breach of fiduciary
23 duty, the second cause of action for constructive fraud, the fourth cause of
24 action for aiding and abetting the breach of fiduciary duty, the fifth cause of
25 action for interference with prospective economic advantage and the sixth cause
26 of action for unjust enrichment are stayed as property of the estate...
27 Under Nevada law, a cause of action for breach of fiduciary duty or aiding
28 and abetting a breach of fiduciary duty belongs to the corporation...
Therefore, the causes of action based on breach of fiduciary duty belong to
Spot and are subject to the automatic stay.

1 See **Exhibit 2**, 2013-1125 Order Addressing Motions for Stay at 4:18-24. Judge Hardy's
2 August 2014 order clarifies that Mr. Peddie may individually own several direct claims that
3 Judge Hardy previously stated were owned solely by the estate.

4 Unlike the August 2014 order, Judge Hardy's November 2013 order did not address
5 *Gentile* and *Cohen*, or related cases and statutes, which allow Mr. Peddie to bring individual
6 and direct claims for breach of fiduciary duty, constructive fraud, and aiding and abetting
7 breach of fiduciary duty. See **Exhibit 1**, 2014-0804 Order Addressing Motions to Dismiss
8 ("Mr. Peddie **may individually bring claims for breach of fiduciary duty, constructive**
9 **fraud, and aiding and abetting breach of fiduciary duty to seek relief for the wrongful**
10 **dilution of his ownership interest in Spot.**"); **Exhibit 2**.

12 Second, even if Judge Hardy did not hand down the August 2014 order, Mr. Peddie
13 would have appealed the November 2013 order at the appropriate time. The state court action
14 is still ongoing and Mr. Peddie may still appeal all issues in the case after trial. Moreover, the
15 fact that Judge Hardy now states that Mr. Peddie does in fact have the ability to bring
16 individual and direct claims based upon fraud and breach fiduciary duty, and that any such
17 order to the contrary is still appealable, flies in the face of the Trustee's argument that the
18 November 2013 order "was final and has not been appealed." In short, Trustee's arguments
19 are not based on the record, the applicable law or the applicable rules of procedure.

21 Third, Trustee's attempt to extinguish rights that do not belong to the estate is
22 improper. Trustee states he is trying to "extinguish any claim Mr. Peddie could bring that has
23 any derivative characteristics." See Motion at 2:23-24. However, as shown above, Trustee is
24 trying to extinguish claims that are individually owned by Mr. Peddie.

26 Trustee's attempt to "extinguish any claim Mr. Peddie could bring that has any
27 derivative characteristics" is based upon a false premise and should be denied outright.

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1 III. Timm Peddie Will Be Prejudiced By The Proposed Compromise

2 The purpose of a compromise agreement is to allow the trustee and the creditors to
 3 avoid the expenses and burdens associated with litigating sharply contested and dubious
 4 claims. *Matter of Walsh*, 669 F.2d at 1328 (citing *In re California Associated Products Co.*,
 5 183 F.2d 946, 949–50 (9th Cir.1950)). As explained in his August 2014 order, Judge Hardy
 6 has found Mr. Peddie may bring individual and direct claims based upon alter ego, fraud, and
 7 breach of fiduciary duty, along with claims as a dissenting shareholder under NRS 92A et seq.
 8 See **Exhibit 1**. Thus, Mr. Peddie’s individual claims survive and as a matter of law are not
 9 dubious.
 10

11 Trustee cannot settle claims owned by Mr. Peddie. It goes without saying that settling
 12 claims belonging to Mr. Peddie, and not the estate, falls “below the lowest point in the zone of
 13 reasonableness.” *Newman v. Stein*, 464 F.2d 689, 698 (2d Cir. 1972). In light of the fact that
 14 the estate does not own the individual claims it is trying to compromise, the proposed
 15 settlement cannot be negotiated in good faith and is unreasonable, unfair, inequitable and
 16 highly prejudicial to Mr. Peddie.
 17

18 IV. Trustee Provides No Basis For The Proposed \$80,000

19 Trustee baldly asserts that the settlement of \$80,000 is fair and reasonable. Trustee
 20 does not state how that number is reasonable.

21 Mr. Peddie’s proof of claim states his claim is worth \$2 million. Trustee has not
 22 explained how settling Mr. Peddie’s claims for a small fraction of the value of the claims at
 23 issue would be fair or reasonable. The reason is clear. The proposed \$80,000 settlement is not
 24 fair or reasonable and should be denied.
 25

26 V. The A&C Factors Weigh Against The Proposed Settlement

27 Trustee points to the factors pointed out in *Martin v. Kane (In re A & C Properties)*,
 28 784 F.2d 1377, 1380-81 (9th Cir. 1986), *cert. denied* 479 U.S. 854 (1986) for the Court’s

1 consideration in determining whether a proposed settlement is reasonable, fair and equitable,
2 which factors are as follows:

- 3 (a) the probability of success in litigation;
4 (b) the difficulties, if any, to be encountered in the matter of collection;
5 (c) the complexity of the litigation involved, and the expense, inconvenience,
6 and delay necessarily attending it;
7 (d) the paramount interest of the creditors and a proper deference to their
8 reasonable views in the premises.

9 *See In re A & C Properties*, 784 F.2d at 1381.

10 Trustee makes no effort to address these factors in any substantive way. He merely
11 concludes Mr. Peddie's claims are owned by the debtor (which is false) and that the business
12 judgment rule insulates Haws, Spot, Spot Investments, John Pettibone and the shareholders
13 and directors at issue (without any analysis therefore). *See* Motion at 6:24-7:2. On the other
14 hand, there is an abundance of evidence that will be provided at trial in the state court action
15 showing the business judgment rule will provide no protection to Haws, Spot, Spot
16 Investments, Pettibone or the other defendants.

17 Moreover, Mr. Peddie's claims are owned by him individually; his probability of
18 success is high considering the facts and evidence at issue; there will be no difficulties in
19 collecting as Haws and Spot Investments and the other defendants are liable for the claims and
20 attendant damages at issue and they, aside from Spot Holdings, are solvent and able to pay any
21 judgment arising from the state court action; the litigation will be hard fought but simple as
22 Mr. Peddie only needs to prove his claims with the evidence that already exists and will be
23 produced by defendants in the state court action and only an expert needs to testify relating to
24 the fair value of Mr. Peddie's shares at the time in question; all creditors of the estate would
25 benefit as they would be entitled to the benefits of having Haws and the other defendants on
26 the hook for the debts and liabilities incurred by the so called debtor, which is the alter ego of
27 Haws and the other state court defendants (which factor is supposed to be paramount).
28

CONCLUSION

Trustee's motion to approve compromise must be denied because the settlement falls below the lowest point in the range of reasonableness for all arguments and is therefore not fair and equitable. Additionally, Mr. Peddie's claims are not owned by the estate and are owned by him individually. Trustee's attempts to extinguish his individual claims is improper in light of Judge Hardy's orders. Any compromise at this point in time would injure Mr. Peddie's and the other creditor's interest as well.

Dated this 19th day of December, 2014.

WATSON ROUNDS, PC

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I certify that I am an employee of WATSON
ROUNDS, P.C., and on this 19th day of December, 2014, I served the document entitled
OPPOSITION TO MOTION TO APPROVE COMPROMISE AND SETTLEMENT OF
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☒ **VIA FIRST CLASS U.S. MAIL:** by placing a true copy thereof enclosed in a sealed
envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada for
delivery to the foregoing.

/s/ Jeff Tillison
Employee of Watson Rounds